

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP322

Cir. Ct. No. 2010CV39

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JESSICA KING, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR
FOR THE ESTATE OF MICHAEL JOHNSON,**

PLAINTIFF-APPELLANT,

V.

KEVIN PIETZ AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

DEAN BRANDT AND EAGLE POINT MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Chippewa County:
STEVEN R. CRAY, Judge. *Modified and, as modified, affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Jessica King, individually and as special administrator for the Estate of Michael Johnson, appeals a judgment dismissing her claim for loss of society and companionship and awarding Kevin Pietz and Rural Mutual Insurance Company \$1,253.50 in costs. We conclude the circuit court properly dismissed King's claim for loss of society and companionship upon a jury finding that she suffered no damages. However, we also conclude that King is a prevailing party because she recovered medical and funeral expenses from Pietz. The circuit court should not have awarded Pietz costs. Accordingly, we modify the judgment to eliminate the \$1,253.50 assessment of costs against King, and affirm the judgment as modified.

BACKGROUND

¶2 Michael Johnson was killed when his shirt caught in the sprocket of a grain elevator on Pietz's farm. King, Johnson's daughter, commenced this action individually and as a special administrator, seeking to recover damages for medical and funeral expenses and loss of society and companionship. The case was tried before a jury, who apportioned negligence evenly between Johnson and Pietz. Medical and funeral expenses were inserted in the verdict by agreement of the parties. The jury awarded zero damages for loss of society and companionship.

¶3 Two judgments were entered. The first directed that Johnson's estate recover one-half of the stipulated funeral and medical expenses, along with

costs.¹ The second judgment dismissed King’s claim for loss of society and companionship and awarded \$1,253.50 in costs to Pietz and his insurer.

¶4 King sought a new trial on the issue of damages for loss of society and companionship. The circuit court concluded the jury was not “acting out of passion, prejudice, or corruption” and could reasonably find zero damages based on the evidence presented. Specifically, the court concluded the jury could have determined the relationship between Johnson and King “bore little, if any, of the types of bonds that an average person considers the bonds between a parent and child.”

¶5 King also challenged the assessment of costs associated with her claim for loss of society and companionship. She argued she was a prevailing party because she recovered medical and funeral expenses, regardless of the zero damages award on her loss of society and companionship claim. The court concluded Pietz was entitled to costs, reasoning that the loss of society and companionship claim belonged to King individually, while the claim for medical and funeral expenses belonged to King as personal administrator.

DISCUSSION

¶6 King first asserts she is entitled to a new trial on the issue of damages for loss of society and companionship. She claims the zero damage verdict was contrary to the weight of the evidence. *See* WIS. STAT. § 805.15.² At

¹ This judgment is not the subject of the present appeal.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

bottom, her position is that, based on the record, “the jury’s damage finding of zero cannot be sustained as a matter of law.”

¶7 “We owe great deference to a circuit court’s decision denying a new trial because the circuit court is in the best position to observe and evaluate the evidence.” *Kubichek v. Kotecki*, 2011 WI App 32, ¶29, 332 Wis. 2d 522, 796 N.W.2d 858, *review dismissed*, 2011 WI 89, 336 Wis. 2d 640, 804 N.W.2d 82. We will not disturb the circuit court’s decision absent an erroneous exercise of discretion. *Id.* In the context of a motion for a new trial, a court erroneously exercises its discretion if its decision is “based upon a mistaken view of the evidence or an erroneous view of the law.” *Id.*

¶8 Evidence at trial established that King had virtually no relationship with her father as a child. King testified that she was born in Eau Claire, but her mother relocated to La Crosse when she was two.³ King lived in La Crosse until she was seven, then moved again to Prairie du Chien, where she was graduated from high school. In her youth, King had contact with her father only once, when she was nine. As she described it, “I got to go to the park, and [Johnson] took me out for pizza, and I just remember it being such a warm, wonderful experience.” King had no contact with her father between the ages of nine and twenty. Outside of that one meeting for pizza, King conceded she had no childhood memories of her father. She also conceded that she never had a father-daughter relationship while growing up.

³ King’s mother and father were never married.

¶9 As an adult, King reestablished contact with her father. In December 1997, she mailed him a Christmas card, and the two corresponded a few times before meeting on Labor Day in 1998. King testified that, following that meeting, they spoke on the phone and occasionally met face-to-face. Johnson attended her wedding, and called her on her birthday and anniversary. Before her marriage, King saw her father approximately once a month. Afterwards, the frequency of those visits decreased to about six times per year. King conceded her job and family responsibilities did not prevent her from spending as much time as she wanted with her father. King appeared to have little knowledge of her father's life after they reestablished contact; although Johnson lived with a woman, King did not know whether they were in a romantic relationship and did not ask her father about it.

¶10 Based on this evidence, the circuit court correctly denied King's motion for a new trial. Although an adult child may recover for the loss of society and companionship of a parent, see *Pierce v. American Fam. Mut. Ins. Co.*, 2007 WI App 152, ¶11, 303 Wis. 2d 726, 736 N.W.2d 247, the jury was entitled to conclude that King and her father were little more than adult friends. King and Johnson had virtually no relationship during King's childhood. Although there is no dispute they later formed a bond, the jury could conclude from the evidence that their adult relationship lacked a compensable degree of "love, affection, care, and protection."⁴ See *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶144,

⁴ The jury instruction given, WIS JI—CIVIL 1897, required the jury to consider several factors when determining the loss of society and companionship, including:

(continued)

297 Wis. 2d 70, 727 N.W.2d 857. Although the death of a close relative may be upsetting, loss of society and companionship does not include “grief or mental suffering” caused by the death. *Id.*, ¶145.

¶11 King also asserts the circuit court erred when it permitted Pietz to recover costs pursuant to WIS. STAT. § 814.03(1). Under that statute, a defendant is allowed costs if the plaintiff fails to obtain a recovery. *See also* WIS. STAT. § 814.01(1). The circuit court determined King was actually “two plaintiffs:” she wore “two hats” by bringing both an individual claim for loss of society and companionship and a wrongful death claim on behalf of the estate. Based on this premise, the court found King’s circumstances analogous to the two plaintiffs in *Gorman v. Wausau Ins. Cos.*, 175 Wis. 2d 320, 499 N.W.2d 245 (Ct. App. 1993). There, a jury awarded damages to a tort victim, but not to his wife on her loss of consortium claim. *Id.* at 326. We concluded the defendant insurer, as the prevailing party on the issue, was entitled to taxable costs associated with the defense of the wife’s claim. *Id.* at 326-27.

¶12 The circuit court’s “two hats” analysis in this case is unsupported by existing law. Unlike *Gorman*, here we have only a single plaintiff, King, who sought recovery for both wrongful death and loss of society and companionship. The wrongful death statute, WIS. STAT. § 895.04, allows a wrongful death plaintiff to recover pecuniary injury—loss of any benefit a beneficiary would have received

the age of the deceased parent and the age of the child; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the child by the parent; [and] the personality, disposition, and character of both the child and the parent.

from the decedent had the decedent lived—as well as loss of society and companionship. *Petta v. ABC Ins. Co.*, 2005 WI 18, ¶¶16-17, 278 Wis. 2d 251, 692 N.W.2d 639 (citing *Chang v. State Farm Mut. Auto. Ins. Co.*, 182 Wis. 2d 549, 560-61, 514 N.W.2d 399 (1994); *Estate of Holt v. State Farm Fire & Cas. Co.*, 151 Wis. 2d 455, 460, 444 N.W.2d 453 (Ct. App. 1989)); *see also* WIS. STAT. § 895.04(4). “Damage for loss of society and companionship is not a separate cause of action but is an additional element of damages recoverable in the cause of action for wrongful death.” *Nichols v. United States Fid. & Guar. Co.*, 13 Wis. 2d 491, 497, 109 N.W.2d 131 (1961).

¶13 It follows, then, that a wrongful death plaintiff can be a prevailing party under WIS. STAT. § 814.03(1) even if he or she does not recover for loss of society and companionship. As long as the plaintiff recovers on some element of damages for wrongful death, the action has been successful and the defendant is not entitled to costs. Here, King was awarded medical and funeral expenses under WIS. STAT. § 895.04(5). Accordingly, Pietz is not entitled to costs. We therefore modify the judgment to eliminate the \$1,253.50 assessment of costs against King. The judgment is affirmed in all other respects.

By the Court.—Judgment modified and, as modified, affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

